Ill. C.C. Docket No. 04-0653
IITA's Data Requests Nos. 1.01 – 1.48
Dated: December 23, 2004

Request: 1.43

Question: Please provide copies of each Minnesota Order referenced in or related to Minnesota dockets and Order referenced in footnote 25 of the Petition.

Response: See Appendix H, attached.

Appendix H

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier

ISSUE DATE: October 27, 1999

DOCKET NO. P-5695/M-98-1285

ORDER GRANTING PRELIMINARY APPROVAL AND REQUIRING FURTHER FILINGS

PROCEDURAL HISTORY

On September 1, 1998 Minnesota Cellular Corporation filed a petition under the federal Telecommunications Act of 1996[1] asking this Commission to designate it an "eligible telecommunications carrier" (ETC) in 43 counties in northern Minnesota. The Company needed the designation to qualify for subsidies from the federal universal service fund.

Initially, the Company requested an ETC designation for both the state and federal universal service funds. Later, the Company asked the Commission to hold its state request in abeyance until state universal service rules were in place.

The following parties intervened in this case: the Minnesota Department of Commerce, formerly the Department of Public Service (the Department); the Residential and Small Business Utilities Division of the Office of the Attorney General (the RUD-OAG); U S WEST Communications, Inc.; the Minnesota Independent Coalition, on behalf of 21 rural telephone companies providing service in the area Minnesota Cellular seeks to serve; and Frontier Communications of Minnesota, Inc. (Frontier).

On June 2, 1999 the Commission issued an Order designating Commissioner Gregory Scott the lead Commissioner for this docket, as permitted under recently passed legislation.[2] The Order authorized Commissioner Scott to exercise the Commission's authority to develop the evidentiary record. Commissioner Scott held hearings on the application on June 2, 3, and 21, 1999.

The case came before the Commission for decision on September 29, 1999.

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[1] Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of title 47, United States Code).

[2] Act of May 6, 1999, ch. 125, 1999 Minn. Sess. Law Serv. (West).

ATTACHMENT 1

FINDINGS AND CONCLUSIONS

I. Historical Background

The federal Telecommunications Act of 1996 is designed to open the nation's telecommunications markets to competition. Its universal service provisions are designed to keep competition from driving rates in rural, insular, and high cost areas to unaffordable levels, by subsidizing them. Only carriers that have been designated eligible telecommunications carriers are eligible to receive these subsidies.

Congress realized that competition would force changes in the network of subsidies keeping rural and urban rates comparable. Traditionally, rural rates, which otherwise would have reflected the higher costs of serving rural areas, were subsidized explicitly by payments from federal high-cost funds and implicitly by requiring carriers to average rural and urban costs when setting rates.

Competition called into question the continued viability of subsidizing rural rates through averaged pricing. While no one was sure how competition would develop, many credible scenarios suggested that it would first appear in urban areas, for two reasons: (1) urban areas cost the least to serve, and (2) urban rates are often inflated by rural subsidies, which new entrants without rural customers would not need. Together, these factors made urban markets the logical starting point for new entrants seeking to underprice the incumbents.

This urban-first scenario not only threatened the incumbent carriers and the rural customers – it did not represent the healthy, robust competition the Act envisioned. Congress therefore directed the Federal Communications Commission (FCC) to work with the states through a Federal-State Joint Board to overhaul existing universal service support systems.[3]

The Act required the FCC to establish collection mechanisms that were equitable and nondiscriminatory and payment mechanisms that were specific, predictable, and sufficient. It required the agency to determine which services qualified for subsidies and to ensure that universal service payments were not used to subsidize other services. It authorized the states to determine which carriers qualified for universal service funding.[4] The Act's term for these carriers was "eligible telecommunications carriers."

II. The Legal Standard

To function as an eligible telecommunications carrier a common carrier must offer and advertise throughout its designated service area the services the FCC has decided to support with universal service funding. It must provide these services using at least some of its own facilities.[5]

[3] 47 U.S.C. § 254.

[4] 47 U.S.C. § 214 (e).

[5] 47 U.S.C. § 214 (e).

The list of services eligible for universal service support will change over time. The Act states that "[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."[6] The current list of services is as follows:[7]

- voice grade access to the public switched network;
- local usage;
- touch-tone service or its functional equivalent;
- single-party service;
- access to emergency services, including 911 and enhanced 911;
- access to operator services;
- access to interexchange services;
- access to directory assistance;
- toll limitation for qualifying low-income customers.

Responsibility for designating eligible telecommunications carriers rests with the state commissions, except in cases in which they lack jurisdiction over the applicant.[8] State commissions must apply the criteria of the Act, the criteria set by the FCC, and any applicable state criteria. (The FCC's original universal service rules barred state commissions from applying any additional state criteria, but that portion of the rules has been invalidated by the United States Court of Appeals for the Fifth Circuit.[9])

The states are required to designate all qualified applicants, except in areas served by rural telephone companies. For these areas the state commission must first make a finding that designating more than one carrier is in the public interest.[10] This requirement reflects Congressional concern that some thinly populated areas might not be able to support more than one carrier.

III. Minnesota Cellular's Application

Minnesota Cellular is a mobile wireless provider licensed by the Federal Communications Commission to provide service in 43 counties in northern Minnesota. The Company requested eligible telecommunications carrier (ETC) status for this entire area and stated that it intended to offer a new service, fixed wireless service, as its universal service offering.

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[6] 47 U.S.C. § 254 (c) (1).

[7] 47 C.F.R. § 54.101 (a).

[8] 47 U.S.C. § 214 (e) (6).

[9] Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. July 30, 1999).

[10] 47 U.S.C § 214 (e) (2).

The new offering would include all services required by the FCC. It would be priced within 10% of the rates charged by the incumbents. It would include, as standard features, enhancements not available from the incumbents, such as an expanded local calling area and limited service mobility. It would also include, as standard features, some enhancements for which the incumbents charge a premium, such as Caller ID and voice mail.

Minnesota Cellular's proposed service area included territory served by U S WEST, GTE Minnesota, Sprint Minnesota, Frontier Communications of Minnesota, Inc., and 37 small carriers that the Company acknowledged to be rural telephone companies. Frontier also claimed to be a rural telephone company, but Minnesota Cellular disputed that claim.

The 37 carriers that all parties agree are rural telephone companies are as follows:

- Barnesville Telephone Company
- Blackduck Telephone Company
- Blue Earth Valley Telephone Company
- Clara City Telephone Exchange Company
- Clements Telephone Company, Inc.
- Dunnell Telephone Company, Inc.
- Farmers Mutual Telephone Company
- Federated Telecom, Inc.
- Felton Telephone Company, Inc.
- Garden Valley Telephone Company
- Granada Telephone Company
- Halstad Telephone Company
- Hills Telephone Company
- Hutchinson Telephone Company
- Interstate Telecommunications Cooperative, Inc.
- Lakedale Telephone Company
- Lismore Cooperative Telephone Company
- Mankato Citizens Telephone Company
- Melrose Telephone Company
- Mid-Communications, Inc.
- Mid-State Telephone Company
- Minnesota Valley Telephone Company
- New Ulm Telecom, Inc.
- Paul Bunyan Rural Telephone Company
- Polar Rural Telephone Company
- Red River Rural Telephone Company
- Redwood County Telephone Company
- Sacred Heart Telephone Company
- Sioux Valley Telephone Company
- Sleepy Eye Telephone Company
- Splitrock Telecom Cooperative, Inc.
- Twin Valley-Ulen Telephone Company
- Western Telephone Company
- Wikstrom Telephone Company
- Winsted Telephone Company
- Winthrop Telephone Company
- Woodstock Telephone Company

IV. Issues Summary

Not only is this Minnesota's first ETC application by a non-incumbent carrier seeking universal service funds, it is the first ETC application by a wireless carrier. It therefore raises several issues of first impression. (The Commission *has* acted on two other ETC dockets – one granted ETC status to all Minnesota incumbent local exchange carriers; the other granted conditional ETC status to a competitive local exchange carrier that later withdrew its application. Neither case offers extensive guidance here.)

The issues in this case fall into four major categories.

A. Challenges to the Application

The first category of issues involves challenges to the application itself. U S WEST, the RUD-OAG, the Minnesota Independent Coalition (MIC), and Frontier all claimed that Minnesota Cellular failed the statutory test for ETC designation, for one or more of the following reasons:

(1) the Company does not currently offer and advertise throughout its service area a service package meeting universal service requirements;

(2) the Company has not described its proposed universal service offering in enough detail or with enough credibility to prove that it meets universal service requirements;

(3) the Company claims that the Commission has no authority over the pricing or quality of its universal service offering, jeopardizing the Commission's ability to protect the public interest and compelling it to deny the application.

B. Rural Telephone Company Public Interest Test

The second cluster of issues relates to whether it is in the public interest to designate a second ETC in the areas within Minnesota Cellular's service area that are served by rural telephone companies. MIC, RUD-OAG, Frontier, and U S WEST contend that designating a second ETC in these areas is contrary to the public interest. The Department of Commerce (the Department) and Minnesota Cellular contend that designating a second ETC is consistent with the public interest.

C. Frontier's Rural Telephone Company Claim

The third cluster of issues has to do with whether Frontier is a rural telephone company under the federal Telecommunications Act of 1996 (the Act). If it is, the Commission cannot designate Minnesota Cellular an ETC in Frontier's service area without first making a finding that it is in the public interest to have more than one ETC in that area.

In this case, however, there would be no need to reach the public interest issue, since Minnesota Cellular has stated that it will withdraw its application as to Frontier's service area if Frontier is found to be a rural telephone company. (One of the special protections the Act grants rural telephone companies is to require ETCs to serve their entire study areas; Minnesota Cellular is not prepared to serve Frontier's entire study area.)

The Department opposed Frontier's claim to be a rural telephone company; the other parties took no position on the issue.

D. Commission Authority Over Minnesota Cellular's Universal Service Offering

The fourth cluster of issues revolves around the Commission's authority to impose conditions on Minnesota Cellular's universal service offering, both initially and on an ongoing basis. Minnesota Cellular contends that the Commission has no authority, initial or ongoing, over the affordability, terms and conditions, or quality of its universal service offering. The other parties contend that the Commission does have initial and ongoing authority, from a variety of sources.

V. Summary of Commission Action

The Commission will grant preliminary approval of Minnesota Cellular's application for ETC status throughout the service area for which it has applied. Final approval will not be granted until the Commission has reviewed and approved a tariff filing detailing the content, pricing, and terms and conditions of the Company's universal service offering.

The Commission finds that it is in the public interest to designate Minnesota Cellular an ETC in the portions of its service area that are served by rural telephone companies, assuming that its universal service tariff passes muster. The Commission rejects Frontier's claim that it is a rural telephone company.

The Commission finds that it does have initial and ongoing authority over Minnesota Cellular's universal service offering. The Commission will exercise that authority to protect the Minnesota public.

These decisions are explained below, using the issues framework developed previously.

VI. Preliminary Finding that the Company's Application Meets ETC Requirements

Parties have raised three major challenges to Minnesota Cellular's application, in addition to claiming that it fails the special public interest test applicable to areas served by rural telephone companies. Those challenges can be summarized as follows:

> (1) To be designated an ETC, a carrier must be offering a service package qualifying for universal service funding at the time of application. Minnesota Cellular fails this test.
>
> (2) Even if intent to offer a qualifying universal service package were adequate, the Company's universal service proposal is not specific or credible enough to demonstrate that it can provide affordable, high-quality service throughout its proposed service area.
>
> (3) The Company's denial of the Commission's authority over the affordability, quality, and terms and conditions of its universal service offering jeopardizes the Commission's ability to protect the public interest and compels it to deny the application.

Each challenge will be addressed in turn.

A. The Application Does Not Fail for Lack of a Current Universal Service Package

Several parties claim that the Act requires an applicant to be actually offering a universal service package including the nine FCC-required services throughout its proposed service area at the time of application. The Commission disagrees.

As the Department pointed out, the federal Act appears to treat ETC designation as a linear process:

> A common carrier *designated* as an eligible telecommunications carrier under paragraph (2), (3), or (6) *shall* be eligible to receive universal service support in accordance with section 254 of this title and *shall*, throughout the service area for which the designation is received –
>
> > (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
> >
> > (B) advertise the availability of such services and the charges *therefor using media of general distribution.*
>
> 47 U.S.C. § 214 (e) (1), emphasis added.

The plain meaning of this language is that once a carrier has been designated an ETC, it <u>shall offer</u> and <u>shall advertise</u> the supported services. The designation comes first; the obligation to offer and advertise the supported services follows.

Similarly, the FCC Order adopting its universal service rules makes the same assumption:

> [A] carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support. . . ."
>
> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997), emphasis in original.

Not only does viewing ETC designation as a linear process square with the plain meaning of the statute, it squares with the underlying policy of opening the nation's telecommunications markets to competition. Requiring ETC applicants to actually offer and advertise universal service packages throughout their service areas before designating them ETCs would be inherently anti-competitive.

It would mean requiring them to serve without providing the subsidies that make that service possible. It would, for all practical purposes, give incumbents a lock on serving high-cost areas, and on the subsidies they carry. This was clearly not the intent of Congress, and the Commission rejects the claim that ETC applicants must be actually providing the precise service(s) for which they seek universal service subsidies at the time of application.

B. The Application Does Not Fail for Lack of Specificity or Credibility

All parties but the Department also claimed that Minnesota Cellular's proposed universal service offering was too indefinite, its technology too untested, or its track record too sparse, to credibly demonstrate its ability to provide high-quality, affordable service throughout its service area. The Commission disagrees.

1. The Company Already Provides Eight of the Nine Required Services and Has No Customers for the Ninth

First, of the nine FCC-mandated services an ETC must provide, Minnesota Cellular already provides eight. (It has no customers eligible for the ninth.) This is a definite and credible indication of its ability to provide the FCC-required services. Those services are as follows

(1) voice grade access to the public switched network;
(2) local usage;
(3) touch-tone service or its functional equivalent;
(4) single-party service;
(5) access to emergency services, including 911 and enhanced 911;
(6) access to operator services;
(7) access to interexchange services;
(8) access to directory assistance;
(9) toll limitation for qualifying low-income customers.

No one disputes that Minnesota Cellular provides touch-tone-equivalent service, single-party service, access to operator services, access to interexchange services, and access to directory assistance. No one disputes that it currently provides voice grade access to the public network, although U S WEST questions whether it can consistently provide voice grade access throughout its service area. (This issue is treated below as a service quality issue.)

Similarly, no one disputes that the Company complies with state law and FCC directives on providing access to emergency services. All Minnesota Cellular customers have access to 911, and the Company is following established procedures for offering enhanced 911 service where available.

No one disputes that Minnesota Cellular currently provides some local usage in all of its service packages. It is unclear at present whether universal service offerings must include unlimited local usage or whether they may include metered usage beyond some unspecified minimum. In any case, the Company has stated that it will offer at least one universal service package with unlimited usage, at least until the FCC completes an ongoing rulemaking that will specify local usage requirements.

Finally, the Company does not currently offer toll limitation to qualifying low income customers, but it currently has no qualifying low income customers. ("Qualifying low income customers" are participants in the federal Lifeline program, which Minnesota Cellular cannot join until it has been designated an ETC.) The Company testified without contradiction that it has the technical capability to offer toll limitation upon designation.

The Company's current provision of eight of the nine required services, together with its clear ability to provide the ninth and its stated willingness to meet the statute's advertising requirements, make a strong case for ETC designation, at least in the areas not served by rural telephone companies. The concerns that remain focus on parties' claims that the Company's service may prove to be unaffordable, of inferior quality, or not available throughout its service area.

2. There Is No Substantial Reason to Doubt the Company's Ability to Provide Affordable, High-quality Service Throughout its Proposed Service Area

a. Service Quality

Some parties questioned Minnesota Cellular's ability to provide high-quality service in all parts of its service area, because wireless service can be disrupted by hilly terrain or other topographic features. Similarly, some parties argued that wireless service cannot support the kinds of advanced services, especially data transmission services, that federal and state telecommunications policies encourage.

Minnesota Cellular countered by promising to do anything necessary to deliver a strong, reliable signal to all customers in its service area, including measures such as placing high-gain antennas on their homes. The technology to ensure continuous, high-quality service is available, the Company said; it is just not normally used for mobile wireless service, since any terrain-related signal disturbance will end as the customer travels. The fixed wireless equipment the Company will offer its universal service customers will have a more powerful signal from the outset, and that signal can be improved as necessary.

The Company conceded that wireless service currently provides lower data transmission speeds than most land line service, but pointed out that the FCC rejected proposals to include data transmission in the nine mandated services.[11] The Company also pointed out that it is uncertain today what "advanced services" will mean as technology develops; by the time the FCC requires advanced services of ETCs, those services may include services uniquely suited to wireless technology.

The Commission finds no substantial basis for questioning the Company's ability or intention to provide high-quality service. The Company has carefully considered possible obstacles to providing high-quality service, has developed strategies for overcoming them, and has pledged to remedy any service quality problems at any cost. This is adequate under any reasonable standard.

Similarly, the Commission does not believe that the slower data transmission speeds that go with wireless technology justify denying this application. One of the Commission's duties under the Act and the FCC rules is to refrain from discriminating against applicants on the basis of technology. One of the explicit goals of the FCC universal service rules is to open

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[11] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997) at ¶ 64.

telecommunications markets to cable and wireless providers.[12] Given these directives, the Commission will not deny this application based on the intrinsic characteristics of wireless technology.

The Commission will, however, condition final ETC designation of Minnesota Cellular on a compliance filing demonstrating adequate service quality, using the Commission's existing service quality standards as a touchstone.

b. Affordability

Several parties claimed that Minnesota Cellular's universal service offering would in fact be loaded with premium features, targeted at high-end customers, and priced beyond the means of many, if not most, residents of its service area. They saw this as a misuse of the universal service fund.

The Commission accepts Minnesota Cellular at its word – and intends to hold it to its word – that it will offer at least one universal service package with unlimited local usage priced within 10% of the incumbents' standard rates. That is affordable by any reasonable standard. If that package contains premium features or an expanded calling area as well, that is between the company and the consumer.

The FCC has explicitly rejected the proposition that ETCs should be forced to offer at least one "stripped down" telecommunications package.[13] That agency, like this one, apparently viewed the Act's ban on subsidizing competitive services with universal service funds[14] as adequate protection against abuse, and welcomed the prospect of those funds sparking competition and innovative service offerings.

c. Service Area

It is undisputed that there are small areas within Minnesota Cellular's proposed service area that its signal does not currently reach. These areas are within the study areas of Farmers Mutual Telephone Company, Felton Telephone Company, Garden Valley Telephone Company, and Wikstrom Telephone Company. It is not clear from the record if these areas are populated, if the incumbents serve anyone there, or if there is any reason to believe anyone there will request service from Minnesota Cellular.

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[12] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997) at ¶¶ 49, 145, 146; *In the Matter of Federal-State Board on Universal Service*, CC Docket No. 96-45, Seventh Report and Order, FCC 99-119 (May 28, 1999) at ¶ 72.

[13] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997) at ¶¶ 86,53.

[14] 47 U.S.C. § 254 (k).

What is clear from the record is that Minnesota Cellular states that it has the capability to serve any customer who materializes within those areas and that it promises to do so promptly, with the same service quality available throughout its service area. It is also clear that there are areas within the incumbents' study areas where they do not offer service and could not serve without building new facilities.

The Commission sees no reason to deny this application or to remove these four study areas from Minnesota Cellular's service area. All carriers, but especially rural carriers, have pockets within their study areas where they have no customers or facilities. If development occurs, they have to build out to the new customer or customers. Minnesota Cellular appears to have the same "build-out" capacity as the incumbents, and the potential need for build-out is no reason to deny ETC status.

C. The Application Does Not Fail for Lack of Commission Authority Over the Company's Universal Service Offering

Several parties urged the Commission to deny the application because the Company denied that the Commission had authority over the quality, terms and conditions, or affordability of its universal service offering. These parties contended that the Company, once designated an ETC, might renege on its commitments to providing affordable, high-quality service throughout its service area.

Of course, the critical issue is not what the Company believes to be the scope of the Commission's authority, but what *is* the scope of the Commission's authority. The Commission is satisfied that its authority over the Company's universal service offering is broad enough for it to ensure high-quality service and affordable rates throughout the Company's designated service area. (The authority issue is treated in detail below.)

Since the Commission has the authority to protect the Minnesota public, it need not seriously consider either of the two courses of action the parties recommended if it lacked that authority: (1) making a finding under 47 U.S.C. § 332 (c) (3) (A) that Minnesota Cellular's services are a substitute for land line communications for a substantial portion of the state, permitting this Commission to regulate its entry and rates, as well as its other terms and conditions of service; or (2) making a finding that this Commission lacks the jurisdiction to act on Minnesota Cellular's ETC application and referring the matter to the FCC under 47 U.S.C. § 214 (e) (6).

VII. Frontier's Rural Telephone Company Claim

Frontier challenged the Company's proposal to serve exchanges within its service area, claiming that, since Frontier was a rural telephone company, the Act required the Company to serve its entire study area if designated an ETC. The Company agreed that it was obligated to serve the entire study area of every rural telephone company, but denied that Frontier was a rural telephone company. The Department concurred with Minnesota Cellular. The other parties took no position.

A. The Legal Standard

Under the Act, a company qualifies for the special protections of a rural telephone company under the following conditions:

The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity—

> (A) provides common carrier service to any local exchange carrier study area that does not include either—
>
> > (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
> >
> > (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
>
> (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
>
> (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines, or
>
> (D) has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.[15]

B. Positions of the Parties

Frontier based its claim to rural telephone company status on the final test, having less than15% of its access lines in communities of more than 50,000. It stated that the only community of over 50,000 it served was Burnsville and that less than 15% of its access lines were in that city.

Minnesota Cellular and the Department claimed that Burnsville was not a "community" within the meaning of the Act, that the term had a broader meaning, such as a "metropolitan statistical area" identified by the Bureau of the Census. Using that definition, Frontier's access lines in Burnsville, Apple Valley, Lakeville, and Rosemount would be counted together, and they would exceed 15% of the Company's lines.

Minnesota Cellular and the Department also argued that it is Frontier's parent company, Frontier Corporation, that must meet the statutory test. All parties agreed that Frontier Corporation did not qualify.

C. Commission Action

The Commission rejects Frontier's claim to rural telephone company status for two reasons: (1) Frontier Corporation is the real entity at issue, and it fails the statutory test; and (2) more than 15% of even the smaller company's access lines are located within the Twin Cities metropolitan area, which is the relevant community under the Act.

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[15] 47 U.S.C. § 153 (37).

1. The Holding Company Is the Relevant Entity and Fails the Test

The statutory phrase "local exchange carrier operating entity," the entity considered for rural telephone company status, is ambiguous. It can be interpreted in at least two ways – as describing a local exchange carrier operating in the field or as describing a larger organization operating a local exchange carrier. The Commission believes that the second interpretation is more consistent with the intent of Congress evinced throughout the Act.

The Act grants special protection to rural telephone companies at several points. Not only does it protect them in the ETC designation process, but it exempts them, at least initially, from the interconnection, resale, and unbundling duties imposed on non-rural carriers to usher in competition.[16] These are significant exemptions that were not lightly granted. The Conference Report on a joint hearing on the Act explained the reasons for the exemption as follows:

> The Senate intends that the Commission or a State shall . . . use this [rural exemption] authority to provide a level playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the [rural] company or carrier.[17]

The Commission finds that, not only does Frontier not need protection from large global or nationwide entities, it is such an entity itself.

Frontier is a wholly owned subsidiary of Frontier Corporation, which has long distance operations throughout the nation and local exchange operations in at least seven other states. It is not an isolated, stand-alone company with scant resources and meager knowledge of the dynamics of the competitive marketplace. The parent company clearly makes its managerial, technical, and even regulatory expertise available for the benefit of Frontier and its other subsidiaries.

In fact, Frontier's own witness on the rural telephone company issue testified that he was regulatory manager for 19 wholly owned subsidiaries of Frontier Corporation in seven states. Although he was on the payroll of Frontier Communications of Minnesota, his salary costs were apportioned between all 19 of the wholly owned subsidiaries he served.

Obviously, the parent company does not leave these 19 subsidiaries to their own devices; it centralizes services requiring special expertise and delivers them on its own terms. This arrangement itself is powerful evidence that it is the holding company whose interests are at issue, that it is the holding company that ultimately controls Frontier, and that is the holding company that should be considered the applicant for a rural telephone company exemption.

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[16] 47 U.S.C. §251 (f).

[17] House Report, 104-458, p. 254 (January 31, 1996).

The Commission finds that in this case the rural telephone company test should be applied to Frontier Corporation, not Frontier Communications of Minnesota, Inc. Since no one claims the larger company meets the test, the application must be denied.

2. More than 15% of Frontier's Access Lines Are in a Community Over 50,000

The Commission also rejects Frontier's narrow reading of the term "community" to mean "municipality" and therefore rejects its claim that less than15% of its access lines are in communities of more than 50.000 people.

Frontier serves four municipalities in the metropolitan area: Burnsville, Lakeville, Apple Valley, and Rosemount. The company claims each municipality is a community. Since only one – Burnsville – has a population of more than 50,000 people, and since less than 15% of Frontier's lines are in that city, Frontier claims to meet the "less than 15%" test. On the other hand, if Burnsville is considered part of a community that includes neighboring Lakeville, Apple Valley, and Rosemount, Frontier fails the "less than 15%" test.

The Commission believes that "community" has a broader meaning than "municipality," that Lakeville, Apple Valley, and Rosemount are part of the same community as Burnsville, and that Frontier fails the "less than 15%" test.

First, "municipality" is a very straightforward word with a very specific meaning. If Congress had meant "municipality," it would have said "municipality." Instead it said "community," a word with a much more expansive and elastic meaning.

Second, not only are the four metropolitan municipalities Frontier serves close neighbors, they are all part of the toll-free metropolitan calling area. They have long been assumed to be part of a larger community whose identity and interests coincide to the point that toll-free calling within the community is required.

Third, Frontier's reliance on the Commission's decision to align new area codes along municipal boundary lines is misplaced. In that case the Commission was forced to break the larger community, the metropolitan calling area, into smaller parts with separate area codes. Using municipal boundaries as boundary lines was a logical way to minimize the confusion that would inevitably accompany new area codes.

Finally, defining "community" to mean "municipality" here would not further, and would in fact contravene, the Act's goal of providing special protection to rural customers. The 50,000 population threshold is clearly intended to function as an indicator of rural status. Burnsville, Lakeville, Apple Valley, and Rosemount are not rural municipalities, but municipalities within a recognized and thriving metropolitan area, unified by toll-free calling. Finding that access lines in these municipalities were access lines located in communities under 50,000 people would not square with the meaning and purpose of the Act.

For all these reasons, the Commission concludes that Frontier fails the "less than 15% of access lines in communities of more than 50,000" test.

VIII. Rural Telephone Company Public Interest Test

A. The Legal Standard

While the Act *requires* state commissions to designate qualifying applicants as ETCs in most cases, that is not true for areas served by rural telephone companies. For those areas, state commissions must first make a finding that designating more than one ETC would be in the public interest:

> . . . . Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). *Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.*[18]

B. Positions of the Parties

1. MIC, Frontier, RUD-OAG, and U S WEST

MIC, Frontier, RUD-OAG, and U S WEST urge the Commission to find that it would not be in the public interest to designate Minnesota Cellular an ETC in areas served by rural telephone companies.

They claim that competition in these areas would create strong economic incentives for the incumbents to defer investment in infrastructure, jeopardizing service quality and delaying the arrival of new technology and new services. They also claim that losing revenues to Minnesota Cellular, either through lost federal subsidies or lost customer billings, could drive up prices for the remaining customers. They cautioned that competition could drive some rural telephone companies out of business, stranding rural customers with Minnesota Cellular's fixed wireless service, which they contended was less reliable and less versatile than land line service.

These parties also challenged Minnesota Cellular's ability and intention to provide high quality, reliable service at affordable rates throughout its proposed service area. This final challenge has already been addressed in section VI.

2. The Department and Minnesota Cellular

The Department of Commerce and Minnesota Cellular claimed that it was in the public interest to designate Minnesota Cellular an ETC in the areas served by rural telephone companies. They emphasized that competition normally brings lower prices, higher quality, consumer choice, new technologies, and innovative services. They argued that none of the rural telephone companies had produced hard financial data showing that they would suffer any harm from competition.

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[18] 47 U.S.C. § 214 (e) (2), emphasis added.

They pointed out that current FCC universal policies permit both the incumbent *and* Minnesota Cellular to receive universal service subsidies for customers taking service from both companies. They emphasized that rural companies, like their urban counterparts, were seeing significant increases in customers ordering second lines, creating a significant source of new revenue, which might even offset the financial effects of lines lost to Minnesota Cellular.

C. Commission Action

The Commission finds that it is in the public interest to designate Minnesota Cellular an ETC in *the portions of its proposed service area that are served by rural telephone companies*.

The Commission begins with the understanding that both Congress and the Minnesota Legislature are deeply committed to opening local telecommunications markets to competition. At the same time, Congress realized that some areas served by rural telephone companies might not be able to support more than one carrier. In these areas competition, especially competition fueled by universal service subsidies, could harm consumers. Congress therefore gave state commissions the authority to determine on a case-by-case basis which areas served by rural telephone companies could not tolerate or benefit from competition.

In this case parties on both sides of the issue claimed that the other had a duty to come forward with empirical evidence that permitting Minnesota Cellular to compete for universal service funds would or would not harm consumers in the areas at issue. The Commission agrees with MIC that Minnesota Cellular had the burden of making an initial showing that subsidy-fueled competition would not harm consumers. The Commission also agrees with Minnesota Cellular that once the Company made that showing it was incumbent upon the rural telephone companies to produce facts demonstrating that consumers in individual areas served by individual companies would be harmed by granting ETC status to Minnesota Cellular. In this case, the evidentiary issue was not close.

Minnesota Cellular produced credible evidence of its intent and its ability to provide a new form of local service, fixed wireless service, throughout its proposed service area. It made a threshold showing of affordability, reliability, and service quality. It made a threshold showing that its service would include specific features and enhancements not available, or available only at a premium, from the incumbents.

This is credible evidence supporting the claim that designating Minnesota Cellular an ETC is in the public interest. It demonstrates that at least three of the goals underlying federal and state policies favoring competition – customer choice, innovative services, new technologies – would be served by facilitating Minnesota Cellular's entry with universal service subsidies. Given the Company's promised pricing of plus or minus 10% of incumbents' rates, it also provides powerful evidence that other goals – lower prices, higher quality, greater efficiency – might also be served.

The rural telephone companies responded basically with statements of general economic theory. They argued that they would face powerful incentives to stop investing in infrastructure for fear of not recouping investments and that this failure to invest would lead to lower service quality. They feared that Minnesota Cellular would capture so many customers that they would have to raise rates to their remaining customers. They cautioned that their remaining customers would probably be lower-income than the more affluent customers drawn to Minnesota Cellular's high-end services.

They stated that the designation of a second ETC would give them the right to relinquish their own ETC status and exit the service area. This, they said, would leave customers in the precarious position of having only wireless service, which is not rate-regulated and cannot support advanced data transmission requirements.

The Commission does not believe that customers in the areas served by the rural telephone companies will be harmed by permitting Minnesota Cellular to receive universal subsidies. In fact, the Commission believes that they will benefit.

First, it is simply not credible to conclude that roughly one-third of this state (the geographical area Minnesota Cellular seeks to serve) cannot support competitive telecommunications markets. That conclusion flies in the face of the area's technological sophistication and economic strength. Clearly, any inability to support competition would occur on a company-specific and area-specific basis.

Second, the rural telephone companies presented no facts demonstrating that consumers served by any particular rural company would be harmed by Minnesota Cellular's entering the market. Their witness could not identify any particular company that he had studied for the adverse effects of designating a second ETC. He could not state which specific companies' service areas had insufficient market demand and growth to support multiple providers. He stated that he had never analyzed an actual scenario with multiple ETCs in a high-cost rural area.[19] He conceded that it was possible that revenues from the growing market for new services and second lines could offset the loss of revenues created by multiple providers.[20]

The rural telephone companies presented no individual or aggregate data on total revenues, total expenses, total earnings, ability to reduce expenses, projected income from new services, or projected income from additional lines. They did not identify how many customers, or how much subsidy, any company could lose before being forced to raise rates, cut back on investment, or relinquish ETC status. The Commission would need this sort of evidence, or evidence equally probative, to conclude that it was not in the public interest to grant Minnesota Cellular ETC status for any particular area.

Third, the general arguments raised in opposition to granting Minnesota Cellular ETC status are not convincing. Even the incumbents claim, for instance, that many customers will take service from Minnesota Cellular as a supplement to land line service instead of as a substitute. In those cases the incumbents will continue receiving universal service subsidies, since the subsidy follows the line, not the customer.

Further, arguments from general economic theory cut both ways. It is not self-evident that telephone companies serving rural areas cannot survive competition from wireless providers. For example, although competition *could* produce a disincentive to invest in infrastructure (for fear of being unable to recoup the investment), it could also spark investment in infrastructure (to provide superior service to beat the competition). Similarly, competition could perform its widely recognized function of motivating the incumbents to find and implement new operating efficiencies, lowering prices and offering better service in the process.

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[19] Hearing Transcript, Volume 2, at 74-76

[20] Hearing Transcript, Volume 2 at 76 and Volume 3 at 72-74.

Finally, the Commission considers the risk of any of the incumbents going out of business (other than through a merger or an acquisition) extremely small, highly speculative, and ultimately manageable. The rural companies' witness testified that none of them had plans to relinquish their ETC designation or withdraw service in the event that Minnesota Cellular's application were granted.[21]

No matter how successful Minnesota Cellular's offering, it is unlikely to gut the incumbents' revenues and universal service subsidies, since few customers will abandon the land line network altogether, at least in the foreseeable future. It is also not clear that relinquishing ETC status, which the incumbents can clearly do under the federal Act, would relieve them of carrier of last resort obligations under Minnesota law

Even if it did, however, and even if one or more of the incumbents stopped providing service, the Commission, Minnesota Cellular, and interested parties would have the statutory twelve-month waiting period to determine how to deal with that development. Minnesota Cellular would have a duty to serve every customer within the service area, and the Commission would have the authority to require Minnesota Cellular to purchase or construct the facilities necessary to ensure adequate service.[22]

The Commission would also have the authority to regulate Minnesota Cellular's rates and impose all the other conditions imposed on competitive local exchange carriers, upon finding that the Company's service was a substitute for land line service for a substantial portion of the communications within the state.[23] In short, even the abandonment of service scenario, although highly speculative and unwelcome, does not threaten severe and irrevocable harm to consumers.

For all these reasons, the Commission finds that it is in the public interest to designate Minnesota Cellular an eligible telecommunications carrier in the areas served by rural telephone companies.

IX. Commission Authority Over Minnesota Cellular's Universal Service Offering

Initially, Minnesota Cellular claimed that in evaluating its application the Commission was limited to considering the factors explicitly listed in 47 U.S.C. § 214 (e) - common carrier status, ability to offer all FCC-mandated services with at least some of its own facilities, compliance with advertising requirements - and could not consider service quality, affordability, or other public interest issues This position had some support in FCC rules barring states from imposing any ETC eligibility requirements that did not appear in § 214 (e) (2).

This was problematic because, as a wireless carrier, Minnesota Cellular was not subject to the state service quality and pricing rules that applied to all other carriers. This raised the possibility of Minnesota Cellular being essentially unaccountable for its universal service offering.

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[21] Hearing Transcript, Volume 3 at 77.

[22] 47 U.S.C. § 214 (e) (4).

[23] 47 U.S.C. § 332 (c) (3) (A).

Other parties countered that references in § 214 (e) (2) to the public interest and universal service principles made the public interest and universal service principles legitimate criteria in evaluating ETC applications. They also claimed that the Commission had authority under state law to consider affordability, service quality and similar public interest criteria.

In the alternative, these parties argued that if Minnesota Cellular were correct, the Commission in reality had no jurisdiction over Minnesota Cellular and should refer the application to the FCC under 47 U.S.C. § 214 (e) (6) (giving the FCC jurisdiction over ETC applications from carriers not subject to state jurisdiction).

This controversy was settled by the Fifth Circuit Court of Appeals, which invalidated the FCC rules barring state commissions from applying state criteria in ETC designations.[24] The Court interpreted the mandatory, discretion-limiting language in the statute as referring to *how many* ETCs a state commission was to designate, not to its criteria for designating them.

Minnesota Cellular continued to maintain, however, that this Commission could not consider service quality and affordability in evaluating its application, because there were no existing regulatory requirements on service quality or affordability applicable to wireless carriers. The Company also maintained that considering affordability ran afoul of the federal prohibition on state regulation of wireless rates[25] and of the state law exempting radio common carriers from the definition of "telephone company."[26] The Commission disagrees.

A. Statutory Authority to Apply Public Interest Criteria

While it is true that state rules on ETC designation were written with land line carriers in mind and apply only to them, the Commission has clear authority under state and federal law to apply normal public interest standards to this application. Minnesota Cellular's suggestion that the Commission must wear blinders and resist considering the public interest is without merit.

Under state law the Commission has comprehensive authority over the provision of telecommunications services in this state. It has a specific legislative mandate to consider eight state goals as it "executes its regulatory duties with respect to telecommunications services." Those regulatory duties would clearly include the duty to designate ETCs. The eight goals the Commission is to consider are as follows (emphasis added):[27]

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[24] Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir.July 30, 1999).

[25] 47 U.S.C. § 332 (c) (3).

[26] Minn. Stat. § 237.01, subd. 2.

[27] Minn. Stat. § 237.011.

(1) *supporting universal service;*
(2) *maintaining just and reasonable rates;*
(3) encouraging economically efficient deployment of the infrastructure for higher speed telecommunications services and greater capacity for voice, video, and data transmission;
(4) encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner;
(5) *maintaining or improving quality of service;*
(6) promoting customer choice;
(7) ensuring consumer protections are maintained in the transition to a competitive market for telecommunications service; and
(8) encouraging voluntary resolution of issues between and among competing providers and discouraging litigation.

The Commission also has a specific legislative mandate, when issuing orders related to telecommunications matters that affect deployment of the infrastructure, to apply the goal of just and reasonable rates.[28] Neither of these legislative directives is limited to dockets involving telephone companies or telecommunications carriers; both apply generally to all telecommunications matters. The Commission concludes that it is authorized and bound to consider these goals in examining this application.

The Commission also agrees with the Department that the federal Telecommunications Act of 1996, which authorizes it to make ETC designations, authorizes it to apply the public interest goals articulated in the Act in making those designations. The universal service goals of the Act include a statement that "quality services should be available at just, reasonable, and affordable rates."[29]

The Act also makes it clear that state commissions bear major responsibility for ensuring that universal service rates are affordable: "The [Federal Communications] Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.[30]"

B. State Statutory Definitions Do Not Deprive Commission of Authority

Minnesota Cellular pointed to the definitions section of the Minnesota telecommunications act to support its claim that the Commission lacked authority over its universal service offering. Those definitions state that radio common carriers are not telephone companies and that telephone company activities that conform to the act's definition of radio common carriers are not regulated under the act.[31]

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[28] Minn. Stat. § 237.082.

[29] 47 U.S.C. § 254 (b) (1).

[30] 47 U.S.C. § 254 (i)

[31] Minn. Stat. § 237.01, subds. 2 and 4.

Expanding these provisions beyond their literal meaning, by suggesting that they demonstrate that radio common carriers are uniquely beyond the jurisdiction of the Commission, is unwarranted. This is especially true in light of more recent legislation subjecting radio common carriers to state universal service fund obligations,[12] and in light of the legislation discussed above, directing the Commission to apply specified goals in the broad contexts of "telecommunications services" and "telecommunications matters."

The Commission does not believe that the Legislature intended these definitions to place wireless carriers receiving public universal service subsidies outside the reach of Minnesota universal service policies.

C. The Commission is Not Preempted from Requiring Affordable Rates of Minnesota Cellular

Minnesota Cellular also claimed that federal law preempted the Commission from requiring that its universal service offering be affordable. The Commission disagrees.

While 47 U.S.C. § 332 (c) (3) clearly bars states from regulating wireless entry or wireless rates except in carefully defined circumstances, requiring a threshold showing of affordability to qualify for a public subsidy is not rate regulation. Rate regulation is much more precise and thoroughgoing than merely requiring a demonstration that rates fall within an affordable range.

Furthermore, if states cannot require a showing of affordability of wireless carriers, they cannot fulfill their responsibility, shared with the FCC, to ensure that universal service "is available at rates that are just, reasonable, and affordable."[13] The Commission concludes that it is not preempted from considering affordability in acting on Minnesota Cellular's application.

X. Conclusion

The Commission will grant preliminary approval to Minnesota Cellular's application, finding that the Company has made a credible showing of its ability and intention to provide a high quality, affordable universal service offering throughout its proposed service area. Final approval will be granted upon Commission review and approval of a tariff filing complying with the requirements discussed in the body of this Order.

ORDER

1. The Commission grants preliminary approval to Minnesota Cellular's application for designation as an eligible telecommunications carrier. Final approval is contingent upon Commission review and approval of the compliance filing set forth in paragraph 2.

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[12] Minn. Stat. § 237.16, subd. 9.

[13] 47 U.S.C. § 254 (i).

2. Minnesota Cellular shall make a compliance filing including the following items:

(a) a tariff containing a detailed description of its universal service package offering, which shall include at least one package which includes both unlimited local usage or the minimum level of local usage set by the FCC and a price that does not exceed 110% of the current rates of the incumbents;

(b) a plan for advertising its universal service offering(s) throughout its proposed service area;

(c) a proposed customer service agreement for Commission review and analysis with and against existing Commission service quality standards.

3. All parties to this proceeding are invited to comment on the Company's tariff filing, under a schedule to be established by the Executive Secretary. The Company shall respond to parties' comments under the same schedule.

4. Upon final designation as an eligible telecommunications carrier, the Company shall file quarterly progress reports on its efforts to implement enhanced 911 service and toll limitation service.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar

Burl W. Haar
Executive Secretary

(S E A L)

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